

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

February 24, 2009 Session

STATE OF TENNESSEE v. LOREN NICHOLS

Appeal from the Circuit Court for McMinn County
Nos. 06-214, 08-275 Carroll L. Ross and Amy Reedy, Judges

No. E2007-02806-CCA-R3-CD - Filed May 8, 2009

The defendant, Loren Nichols, pleaded guilty in the McMinn County Circuit Court to one count of conspiracy to obtain a controlled substance by misrepresentation, *see* T.C.A. §§ 39-12-103, 53-11-402 (2003), and one count of obtaining a controlled substance by misrepresentation, *see id.* § 53-11-402. Pursuant to a plea agreement with the State, the defendant agreed to a sentence of two years' probation and a \$2,000 fine. Further, the plea agreement provided that the defendant would be allowed to apply for judicial diversion; however, the judgments of conviction reflecting his two-year sentence were entered on the day of the defendant's plea, and the trial court subsequently refused to hear his motion for judicial diversion. The defendant appeals, arguing that "the trial court erred in refusing to rule on the merits of [his] request for judicial diversion." Prior to this court's ruling on his direct appeal, the defendant filed a petition for post-conviction relief which was summarily dismissed by the post-conviction court on the grounds that final action had not yet been taken by this court in his direct appeal. *See* T.C.A. § 40-30-102(a) (2006). The defendant appeals from the denial of his post-conviction petition, which this court consolidated with his direct appeal. After review of this procedurally complex case, we dismiss the defendant's direct appeal, case number E2007-02806-CCA-R3-CD, as untimely. In light of this, we hold that the trial court erred by dismissing his post-conviction petition because the defendant's judgments became final prior to his untimely notice of appeal. In case number E2008-01976-CCA-R3-PC, we reverse and remand with instructions that trial counsel, Martin J. Levitt, withdraw as post-conviction counsel.

Tenn. R. App. P. 3; Appeal Dismissed; Judgments of the Circuit Court Reversed and Remanded

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Martin J. Levitt, Chattanooga, Tennessee, for the appellant, Loren Nichols.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; Steven Bebb, District Attorney General; and Paul Rush, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In March 2006, a McMinn County grand jury indicted the defendant for one count of conspiracy to commit prescription fraud and one count of prescription fraud. The grand jury alleged in Count I that on or between July 3, 2003, and October 20, 2004, the defendant and his co-conspirators unlawfully and knowingly agreed to engage in prescription fraud. Specifically, it alleged that “on April 12, 2004, [three conspirators] took prescriptions written by [the defendant] to the Medical Shop and Walgreen[’s] Pharmacy in Athens, Tennessee, to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge.” Count II alleged that the defendant “did unlawfully and knowingly or intentionally obtain or attempt to obtain possession of a controlled substance, by misrepresentation, fraud, forgery, deception, or subterfuge.” The defendant made an unsuccessful application for pretrial diversion, and on June 6, 2007, the defendant filed a “Petition for Writ of Certiorari to Review Action of the District Attorney Refusing Diversion,” but the record does not clearly reflect the disposition of this motion.¹

The record establishes the Honorable Amy Reedy served as the assigned trial court judge for the defendant’s case, and Judge Reedy had presided over the case during its pretrial stages, including hearing evidence regarding a motion to suppress. On August 6, 2007, however, the defendant pleaded guilty pursuant to a plea agreement before the Honorable Carroll Lee Ross.² Judge Ross and Judge Reedy both served on the Tenth Judicial Circuit bench and shared jurisdiction in McMinn County. During the plea hearing, both parties informed Judge Ross that, upon his acceptance of the plea, Judge Reedy would hold a hearing on judicial diversion at a later date. We glean from the record that, although no legal rule apparently prevented these judges from hearing cases on each others’ dockets, Judge Ross and Judge Reedy maintained a policy of generally not hearing cases assigned to the other. Judge Ross, however, agreed to take the defendant’s guilty plea, although Judge Reedy had previously handled matters in the case. Judge Ross explained, “I wasn’t going to hear anything other than just take a plea. . . . Once we assign cases, they’re supposed to stay with that [j]udge, but I don’t mind doing it then on this way, but [Judge Reedy] will determine everything at this point.”

¹Unfortunately, we have no written order or hearing transcript explicitly stating the court’s action, if any, on this petition. In a subsequent, unrelated proceeding before Judge Ross, defense counsel represented that Judge Reedy conducted a hearing for pretrial diversion and that “she already had overruled” the petition. Further, both parties acknowledge the denial of pretrial diversion in their briefs addressing this court. Judge Reedy expressly denied these representations in a later-conducted hearing. She stated,

[I]t was represented to [Judge Ross] that I heard the pretrial diversion. This Court had no authority whatsoever to grant or deny pretrial diversion. I can only consider whether or not the State . . . has abused their discretion whether or not to grant pretrial diversion, and I refer it back to the District Attorney General. It has been represented to Judge Ross; it was represented to the Court of Appeals that I denied a pretrial diversion. I did no such thing. I have no authority to do that.

We further note, however, that the defendant does not challenge the disposition of his application and denial of pretrial diversion.

²According to the technical record, Judge Ross also presided over the defendant’s arraignment.

Although the record contains no written terms of the plea agreement, the transcript of the plea agreement offered by the State provides:

[C]ount one is a D felony conspiracy to commit prescription fraud. That is a two-year sentence to be probated immediately. A \$2,000.00 fine will be assessed. It will run concurrent with count two, and that is prescription fraud, obtaining drugs by fraud, and that would be a two-year, also suspended sentence, probated immediately, no fine. The defendant has already completed the alcohol and drug evaluation assessment required by law and this code. In fact, he has completed rehabilitation as well

During oral argument to this court, the State conceded that the defendant understood that he would have an opportunity to file for judicial diversion when he pleaded guilty. The transcript of the guilty plea reflects that Judge Ross accepted the plea and then set an August 13, 2007 hearing on Judge Reedy's docket for the defendant's motion for judicial diversion, which defense counsel acknowledged had not yet been filed.

After Judge Ross accepted the defendant's guilty plea, he entered judgments of conviction. The judgments, entered on August 6, 2007, display the signatures of both the prosecutor and defense counsel. Judge Ross and the defendant also signed a probation order to commence the serving of the defendant's sentence on August 6. Three days later, on August 9, 2007, the defendant filed his motion for judicial diversion.³

We have no transcript of the August 13, 2007 hearing before Judge Reedy; however, according to an order entered by Judge Reedy,

On the 13th of August, . . . [Judge Reedy] learned the defendant had entered a plea in this case in front of Judge Carroll L. Ross on the 6th day of August, 2007. Upon further inquiry [Judge Reedy] was told it was represented to Judge Ross by both parties that [Judge Reedy] was in agreement that Judge Ross take the plea and [Judge Reedy] would follow up and hear a motion by the defendant to be placed on [j]udicial [d]iversion.

To set the record straight, this court never discussed or had an agreement with any of the parties or anyone else relative to this case. As far as this [c]ourt knew the case was to go to trial on the 14th of August as had been scheduled.

Judge Reedy refused to hear any arguments regarding the defendant's motion for judicial diversion.

³Defense counsel signed the certificate of service and dated it August 6, 2007; however, the court clerk's filing stamp reflects a filing date of August 9, 2007.

On October 1, 2007, the case again came before Judge Ross, although the record is unclear as to how the defendant's case reappeared on Judge Ross's docket. A record of the October 1, 2007 hearing, styled as a "Status Hearing," shows that Judge Ross refused to hear the defendant's motion for judicial diversion "based on [both parties'] representation [Judge Reedy] was going to do it." Judge Ross further noted, "[T]he judgment's 30 days old. I don't think I could hear a diversion at this point." Judge Ross then set the defendant's case back on Judge Reedy's docket.⁴

During a November 13, 2007 status hearing, Judge Reedy once more refused to hear the defendant's motion for judicial diversion. Judge Reedy explained that she never "authorize[d] [the defendant's] case to be placed on [Judge Ross's] docket." She said, "I want the record to be very clear that the representations that were made to Judge Ross on the 6th day of August, 2007, were . . . untrue." She explained that counsels' representations that the parties "would be going to another [c]ourt for a hearing on the judicial diversion . . . was without any . . . permission or even the slightest bit of respect to this [c]ourt," and she opined that was an improper manner in which to proceed. Judge Reedy noted that the behavior of counsel was indicative of "forum shopping," and she stated, "[Y]ou can't do that in this jurisdiction because we have split the docket."

Judge Reedy pointed out that on August 6, 2007, "a judgment of conviction was signed . . . by [defense counsel] and [the State], a judgment of conviction that [was] final" and further noted that "[d]iversion was not checked" on the judgment forms. Judge Reedy then noted that "the defendant was set up on probation that day, as witnessed by the defendant's signature on the probation order." Judge Reedy said, "Judicial diversion is not available after an adjudication of guilt, an entry of judgment of conviction, which is what we have in this case. Because of the manner in which this case has been handled, this Court no longer has jurisdiction." She also stated, "You may appeal." Judge Reedy entered a written order on November 13, 2007, and found that the court "no longer ha[d] jurisdiction in this case and it [was] hereby removed from the court's docket of November 13, 2007."

The defendant filed a notice of appeal on December 11, 2007. On August 1, 2008, while the defendant's direct appeal was pending before this court, the defendant also filed a petition for post-conviction relief alleging that his guilty plea was involuntary and that he was denied the effective assistance of counsel. Judge Ross summarily dismissed the petition as premature on August 4, 2008, noting that final action had not yet been taken regarding the defendant's direct appeal. The defendant⁵ filed a notice of appeal to the dismissal of his post-conviction petition on September 2, 2008. This court consolidated the defendant's direct and post-conviction appeals on October 29, 2008. We will first evaluate the defendant's arguments on direct appeal before addressing his post-conviction petition.

⁴ On November 8, 2007, the defendant filed a "Motion to Designate a Judge," asking the Tenth Judicial District's presiding judge, the Honorable John B. Hagler, to direct a judge to hear the defendant's motion for judicial diversion. Judge Hagler assigned the case to Judge Reedy.

⁵ While generally it is the policy of this court to refer to a convicted defendant petitioning for post-conviction relief as "petitioner," in this unique situation where we simultaneously address both a direct and post-conviction appeal, we will refer to the petitioner as "defendant" for purposes of clarity.

Direct Appeal

The defendant cites as his sole issue on direct appeal that the trial court erred “in refusing to rule on the merits of [the defendant’s] request for judicial diversion.” The defendant argues that he would not have entered into the guilty plea agreement had he known that he would be unable to pursue judicial diversion in a later hearing. He argues, “If the [d]efendant had know[n] this was an issue he could have remedied it, since he was within 30 days of his guilty plea by filing a motion under T[ennessee] R[ule] [of] C[riminal] P[rocedure] 32(f)(2), unlike the defendant in *State v. Turco*, 108 S.W.3d 244 (Tenn. 2003).”

The State argues that the defendant’s appeal “should be dismissed given that the defendant has no appeal as of right under Rule 3 of the Tennessee Rules of Appellate Procedure.” The State admits that “[i]t has long been held that an appeal as of right may be taken after entry of judgment, when the trial court denies judicial diversion,” but nevertheless maintains that “the defendant is not appealing the trial court’s denial of judicial diversion.” The State characterizes the defendant’s appeal as an appeal of “the trial court’s order entered November 13, 2007, in which the court found that it no longer had jurisdiction in the case.” The State further argues that “the trial court . . . was not authorized to consider the defendant’s motion for judicial diversion” because the judgments had been entered and sentence imposed.

To begin our analysis, we must evaluate whether the defendant’s appeal is properly before this court. The record establishes that judgments of conviction were entered on August 6, 2007, which judgments accurately reflect the defendant’s guilty plea and sentence and bear the signatures of the trial court judge, defense counsel, and the assistant district attorney general. Generally, a judgment in a criminal case becomes final 30 days after its entry, and thereafter, a trial court has no jurisdiction to modify it. *See State v. Peele*, 58 S.W.3d 701, 704 (Tenn. 2001); *State v. Thomas Coggins*, No. M2008-00104-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Feb. 25, 2009); *see also State v. Jack Lee Thomas, Jr.*, No. 03C01-9504-CR-00109, slip op. at 2-3 (Tenn. Crim. App., Knoxville, Nov. 15, 1995). However, in a criminal action, a trial court’s jurisdiction may be extended by the timely filing of a motion for a judgment of acquittal, a suspended sentence, a withdrawal of a plea of guilty, a new trial, or arrest of judgment. Tenn. R. App. P. 4(c). The record shows that the defendant failed to file any of these tolling motions. The only motion that the defendant filed within 30 days of the entry of his judgments of conviction was his “Motion for Judicial Diversion” filed on August 9, 2007, which cannot be considered a tolling motion. Because the defendant’s motion for judicial diversion did not extend the trial court’s jurisdiction, the judgments of conviction became final 30 days after their entry on August 6, 2007.

Because the defendant’s judgments became final on September 5, 2007, his notice of appeal, filed on December 11, 2007, was well outside the 30-day time period required by Rule 4 of the Tennessee Rules of Appellate Procedure. *See* Tenn. R. App. P. 4(a). We note that this time limitation is not jurisdictional and the late filing of a notice of appeal may be waived in the interest of justice. *Id.*

When we ponder the interest of justice at stake in allowing the late appeal to proceed, we are mindful that judicial diversion, which refers to the procedure of probation and expungement

provided in Tennessee Code Annotated section 40-35-313, is only available “without entering a judgment of guilty.” *State v. Turco*, 108 S.W.3d 244, 248 (Tenn. 2003) (citing T.C.A. § 40-35-313(a)(1)(A) (1997 & Supp. 2002)). Further, a trial court has no authority to grant diversion after the “imposition of sentence.” *Id.* Our supreme court has made it clear that, in order for the trial court to grant diversion after the entry of a judgment, “the trial court first would be required to vacate the judgment of conviction.” *Id.* The defendant’s motion for judicial diversion did not include any request to vacate the judgments, which had been entered and signed by defense counsel. Further, the defendant had commenced serving his probationary sentence and had personally signed the probation order. In light of these procedural problems, we find no compelling reason to consider the defendant’s late-filed appeal. The defendant became ineligible for judicial diversion upon the entry of his judgments of conviction and the initiation of his probationary sentence. Defense counsel’s actions in signing the judgments and allowing the commencement of sentence without objection directly led to the defendant’s ineligibility. We acknowledge that Judge Ross and Judge Reedy’s repeated resetting of the defendant’s case prolonged it; however, these events all occurred *after* the entry of judgments and did not prejudice the defendant’s inapt motion for judicial diversion. Accordingly, we dismiss the defendant’s late-filed direct appeal.

Post-Conviction Petition

The defendant presents two issues in his appeal of the post-conviction court’s denial of his post-conviction petition. First, he asserts, without citation to any authority, that Judge Ross “was not the proper judge to decide the petition.” We decline consideration of this issue because the defendant, contrary to the mandates of Rule 10(b) of the Rules of the Tennessee Court of Criminal Appeals, has failed to make even a fleeting reference to legal authority in his argument. Tenn. Ct. Crim. App. R. 10(b).

However, we find merit in the defendant’s second issue, which argues that the post-conviction court erred in dismissing his petition as premature. *See* T.C.A. § 40-30-102(a) (2006) (“[A] person in custody under a sentence of a court of this state must petition for post-conviction relief under this part within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final.”). The defendant argues that, if this court finds that his judgments became final on September 5, 2007, then his petition, filed on September 2, 2008, was timely. Because we have determined that the defendant did not file a timely direct appeal and declined to entertain the appeal, the defendant’s post-conviction petition was valid and timely to the final judgments of September 5, 2007. *See Hill v. State*, 111 S.W.3d 579, 580 (Tenn. Crim. App. 2003) (noting that, in relation to the commencement of the statute of limitations for a post-conviction petition, “[a] trial court’s judgment becomes final thirty days after its entry unless a *timely* notice of appeal or specified post-trial motion is filed”) (emphasis added).

Accordingly, the post-conviction court erred in dismissing the defendant’s petition as premature, and we reverse and remand in order for his petition to be determined on its merits. At this point, we note that defendant’s trial and direct appellate counsel, Martin J. Levitt, has entered his appearance as a counsel of record for the post-conviction petition, which petition alleges ineffective assistance of counsel. It is well-settled that serving both roles is unethical. In

McCullough v. State, 144 S.W.3d 382 (Tenn. Crim. App. 2003), this court specifically held that representing a defendant in a post-conviction proceeding after having represented the defendant on direct appeal created an actual conflict of interests. *Id.* at 385; *see also* Tenn. Sup. Ct. R. 8, RPC 1.7(b) (2008). A post-conviction petitioner's statutory right to counsel "includes the right to be represented by conflict-free counsel." *McCullough*, 144 S.W.3d at 385 (citing *Kevin Burns v. State*, No. W2000-02871-CCA-R3-PD (Tenn. Crim. App., Jackson, Aug. 9, 2001)). When an attorney is placed in a position of divided loyalties between himself and his client, an actual conflict is created. *Id.* Here, should Mr. Levitt, who was retained by the defendant, remain as post-conviction counsel, he could be forced to review his own performance at trial and on direct appeal, and he could become a witness in a post-conviction hearing. Thus, we discern that an actual conflict now exists in Mr. Levitt's continued representation of the defendant as a post-conviction petitioner. Therefore, on remand, the trial court shall conduct a hearing to fully disclose to the defendant the conflict of interests and to determine the defendant's desires regarding Mr. Levitt serving as his post-conviction counsel. *See McCullough*, 144 S.W.3d at 386 (stating that actual conflicts may be waived by the client after full disclosure).

To be effective, the waiver must demonstrate that the client fully understands the nature of the conflict and how it might affect him or her; that the client understands his or her right to the appointment of other counsel if necessary; and that, notwithstanding the potential ill effects, the client desires to proceed with his or her lawyer.

Id. If the defendant "demonstrates a knowing and voluntary waiver of a conflict of interest," *id.*, the trial court nevertheless has the latitude to reject the waiver because the "likelihood and dimensions of conflict are often difficult to predict." *Id.*, (quoting *Kevin Burns v. State*, No. W2000-02871-CCA-R9-PD (Tenn. Crim. App., Jackson, Aug. 9, 2001)).

Conclusion

In light of the foregoing analysis, we dismiss the defendant's direct appeal as untimely. We further find that because the defendant's direct appeal was ineffectual, the post-conviction court erred by dismissing his petition for post-conviction relief as premature, and we reverse and remand for further proceedings. Finally, the post-conviction court, on remand, shall address the issue of Mr. Levitt's service as post-conviction counsel, as detailed above.

JAMES CURWOOD WITT, JR., JUDGE